Office - Supreme Court, U.S.
FILED
SEP 24 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-523

In The

Supreme Court of the United States

October Term, 1982

CONTAINER CORPORATION OF AMERICA,
Appellant,

vs.

FRANCHISE TAX BOARD,
Appellee.

On Appeal From The Court of Appeal Of The State Of California For The First Appellate District

BRIEF OF AMICUS CURIAE STATE OF NORTH DAKOTA IN SUPPORT OF BRIEF OF FRANCHISE TAX BOARD

ROBERT O. WEFALD
Attorney General of
State of North Dakota
State Capitol
Bismarck, North Dakota 58505
(701)224-2210

KENNETH M. JAKES
Counsel of Record
Assistant Attorney General
State of North Dakota
State Capitol-Eighth Floor
Bismarck, North Dakota 58505
(701) 224-2770
Counsel for Amicus Curiae
State of North Dakota

CORKLE PRINTING CO., 2311 Douglas St., Omaha 68102

TABLE OF CONTENTS

Pages

Table of Authorities i

Interest of Amicus Curiae State of North Dakota 1

Argument 2

Summary of Argument 19

Conclusion 21

TABLE OF AUTHORITIES

CASES

Adams Express Company v. Ohio State Auditor, 165 U. S. 194 (1897) 8, 18

ASARCO Inc. v. Idaho State Tax Commission, — U. S. —, 50 Law Week 4962 (1982) 10, 19, 20, 21

Butler Brothers v. McColgan, 315 U. S. 501 (1942) 6, 9

Edison California Stores, Inc. v. McColgan, 30 Cal. 2d 472, 183 Pac. 2d 16 (1947) 15, 16

Exxon Corporation v. Wisconsin Department of Revenue, 447 U. S. 207 (1980) 9

F. W. Woolworth Co. v. Taxation and Revenue Department of New Mexico, — U. S. —, 50 Law Week 4957 (1982) 10, 19, 20, 21

Honolulu Oil Corporation v. Franchise Tax Board, 60 Cal. 2d 417, 386 Pac. 2d 40 (1963) 6, 11

Mobil Oil Corporation v. Commissioner of Taxes of Vermont, 445 U. S. 425 (1980) 10, 13, 17, 20

TABLE OF AUTHORITIES—Continued

Pages

Superior Oil Company v. Franchise Tax Board, 60 Cal. 2d 406, 386 Pac. 2d 33 (1963) 6, 11

Underwood Typewriter Company v. Chamberlain, 254 U. S. 113 (1920) 9, 18

Union Pacific Railway Company v. Cheyenne, 113 U. S. 516 (1885) 7, 8

STATUTES

Chapter 57-38, North Dakota Century Code 1

Chapter 57-59, North Dakota Century Code 1

REGULATIONS

Multistate Tax Commission, Regulation IV.1.(b) 1, 2

North Dakota Administrative Code, Section 81-03-09-04 ..... 1, 3

OTHER AUTHORITIES

1981 B. Y. U. Law Review 87 13

Keesling, Frank, A Current Look at the Combined Report and Uniformity in Allocation Practices, 42 Journal of Taxation 106 (February, 1975) 11, 12

Keesling and Warren, California's Uniform Division of Income for Tax Purposes Act, 15 U. C. L. A. Law Review 156 (1967) 11

No. 81-523

In The

Supreme Court of the United States

October Term, 1982

CONTAINER CORPORATION OF AMERICA,

Appellant,

vs.

FRANCHISE TAX BOARD,

Appellee.

On Appeal From The Court of Appeal
Of The State Of California
For The First Appellate District

BRIEF OF AMICUS CURIAE STATE OF NORTH DAKOTA IN SUPPORT OF BRIEF OF FRANCHISE TAX BOARD

Interest of Amicus Curiae State of North Dakota

The State of North Dakota imposes a corporation net income tax, Chapter 57-38 of the North Dakota Century Code, and has enacted the Multistate Tax Compact, Chapter 57-59 of the North Dakota Century Code. The North Dakota State Tax Commissioner is charged with the administration of these two laws and has duly adopted and promulgated regulations for the administration of them. Those regulations include Section 81-03-09-04 of the North Dakota Administrative Code. That regulation is the same as Multistate Tax Commission Regulation IV.1.(b), part of which is quoted below at the beginning of the Argument in this brief.

The North Dakota State Tax Commissioner in auditing and assessing multistate and multinational corporations has applied the same income apportionment principles as those applied by the California Franchise Tax Board in the case on appeal here. The interest of the State of North Dakota in this appeal therefore parallels that of the Appellee, the Franchise Tax Board.

ARGUMENT

A Corporation Involved In A Single Business Is Unitary

The Multistate Tax Commission Regulations

Reg. IV.1.(b) of the Apportionment Regulations Adopted Under Article IV of the Multistate Tax Compact provides in part:

> Two or More Businesses of a Single Taxpayer. A taxpayer may have more than one "trade or business." In such cases, it is necessary to determine the business income attributable to each separate trade or business. The income of each business is then apportioned by an apportionment formula which takes into consideration the instate and outstate factors which relate to the trade or business the income of which is being apportioned.
>
> • • •
>
> The determination of whether the activities of the taxpayer constitute a single trade or business or more than one trade or business will turn on the facts in each case. In general, the activities of the taxpayer will be considered a single business if there is evidence to indicate that the segments under consideration are integrated with, dependent upon or

contribute to each other and the operations of the taxpayer as a whole. The following factors are considered to be good indicia of a single trade or business, and the presence of any of these factors creates a strong presumption that the activities of the taxpayer constitute a single trade or business:

(1) Same type of business. A taxpayer is generally engaged in a single trade or business when all of its activities are in the same general line. For example, a taxpayer which operates a chain of retail grocery stores will almost always be engaged in a single trade or business.

Under this regulation adopted by the Multistate Tax Commission, California, and other states, including North Dakota which has adopted it as North Dakota Administrative Code § 81-03-09-04, a presumption is created that a single business exists when the same activities are carried on in every state by a single corporation.

Presumptions may be of fact, of law, or a mixture of both. The presumption set forth in the Multistate Tax Commission regulation, while not specifically classified, may reasonably be described as a presumption of fact. According to Black's Law Dictionary, "Presumptions of fact are not the subject of fixed rules, but are merely natural presumptions, such as appear, from common experience, to arise from the particular circumstances of any case. . . . They may be said to be the conclusions drawn by the mind from the natural connection of the circumstances disclosed in each case, or, in other words, from circumstantial evidence." To be valid a presumption must be based in reason or common experience. The presumption set forth in the regulation meets this criterion and should be followed by the Court in this case.

4

COMMON SENSE

Take a businessman who operates a particular enterprise and has developed experience in the vagaries of that individual business in which he engaged. If our businessman operates a grocery store he has learned that general climatic conditions affect the products sold. He has learned that the placement of goods at particular shelf levels influences the amount of sales. He has also learned the importance of store location and parking and a myriad of other details. Some, but not all, of this experience will be transferable to operating a gas station or a drug store. Very little of it will be useful if our businessman attempts to operate a steel foundry.

Assuming our businessman wishes to expand his business, is he more likely to buy a steel mill or another grocery store? Clearly, the grocery store. If he locates in another area with different climate and clientele, he will discover his product mix must be different, but many of the fundamentals of the business remain the same. He will have learned many lessons from operating his first business which will prevent mistakes in his second business. He will have a leg up on an erstwhile competitor who attempts to enter a business with no experience.

Not only will our businessman profit from his past experience, he will also profit from his past contacts. Suppliers will know him and he will have established a track record. Credit will be easier to obtain, discounts may be forthcoming, and an array of other intangible benefits may flow.

Suppose our businessman's operation has become quite large. In the past he found it feasible to set up stores only in established areas in order to generate necessary volume. But with size comes the opportunity for strategic planning. Our businessman has the resources to enter into newly developing areas. A store in such an area can be carried by the business as a whole while the neighborhood develops. But, once it develops, the store may be even more lucrative. The store obtains a toe-hold and can grow with the neighborhood. It builds its clientele with the neighborhood, it establishes shopping habits, it creates loyalty. But, it was not a separate business when it started and it is not a separate business when it matures. It remains part of the same business and supports new additions as it was once supported. It does not compete with other members of the business, it supplements them. Each store is stronger for its association with the other stores.

This is the principle behind the presumption in the regulation. It exists and it is real. The contributions involved are not susceptible of valuation, however. Common sense tells us they exist, but no science can quantify the difference resulting from such interaction. The existence of this interaction and the synergistic benefits involved is one of the principal justifications for reliance on the unitary business concept by the states and for its acceptance by the courts.

DECISIONS BY THE CALIFORNIA COURTS

It is particularly aproriate that this Court has before it a case involving the State of California. California has

been one of the pioneers in developing and rationalizing state income taxation. *Butler Brothers v. McColgan,* 315 U.S. 501 (1942), is a California case. Two landmark cases in the development of the unitary concept are the companion cases of *Superior Oil Co. v. Franchise Tax Board,* 60 Cal. 2d 406, 386 Pac. 2d 33 (1963), and *Honolulu Oil Corp. v. Franchise Tax Board,* 60 Cal. 2d 417, 386 Pac. 2d 40 (1963). These decisions are worthy of review by this Court. Both cases involved oil companies that were engaged in the exploration, production and sale of crude oil products in several states. "Generally, raw production was sold at the well site to other companies. All production in California was sold in California, and all out-of-state production was sold outside of California." (pp. 408 and 420.) Over the objections of the Franchise Tax Board and incidentally at the pleadings of counsel for Appellant, Container Corporation of America (hereinafter "CCA"), the Courts found that the single corporation conducted a unitary business.

In *Superior,* the trial court found, and the California Supreme Court accepted, that:

> "California business operations contributed substantially to the out-of-state portion" of its business in areas relating to executive policy making, administrative control, coordination of exploration activities, well production and land acquisition, training of technical personnel, specific scientific and technical development and testing laboratories, drilling operations and drilling equipment, manufacturing and sales, accounting, tax returns, personnel, insurance and purchasing.
>
> The court also found that "Superior's California operations were substantially dependent upon the

out-of-state operations" in areas relating to the borrowing of substantial funds on assets located outside of California in order to finance projects within California, the transfer of company funds from sources outside of California to finance projects within California, legal counseling provided by the chief counsel located in Texas and other attorneys in Washington, D. C., the supplying and control of tubular materials from Superior's Texas office and transfer of other materials to California from company sources outside of California, fiscal control from Superior's Texas office for half of the year in question, geophysical technical information and services supplied to California from the company's Texas laboratories, certain land-lease controls supplied by offices in Texas, the transfer of valuable drilling equipment from out of state for California operations, the transfer of skilled personnel from out of state for purposes of performing services in California, and the supply, on a daily basis, of technical and other information to the company's California offices in order that executive and policy decisions could be made and overall control exercised.

In essence, the California courts found that the same business was conducted in all states, or rather that a single business existed even though there were almost no physical connections between activities carried on in the various states. The connections which existed were those resulting from exchange of personnel and information and the utilization of such resources by the whole business.

UNITARY DECISIONS OF THIS COURT

The unitary business principle was first postulated by a number of western states in an effort to fairly assess property taxes. *Union Pacific Railway Company v. Cheyenne*, 113 U. S. 516 (1885). These states and their

cities were confronted with the problem of equitably spreading the tax burden among most businesses whose assets were located wholly within a single jurisdiction and businesses such as railroads and public utilities whose assets were dispersed over a number of jurisdictions. The state law sustained in *Union Pacific* provided that the value of the whole property in the state should be ascertained and then assigned proportionally, on a mileage basis, to the individual jurisdictions. The law was based on the theory that the railroad constituted a single business or unit, not a large number of separate businesses whose boundaries conformed neatly to the geographic divisions within the state.

The unitary business principle was gradually extended by the states and the courts to encompass business locations which were not tied directly to each other through a physical connection such as rails. In *Adams Express Company v. Ohio State Auditor*, 165 U. S. 194 (1897), the Court sustained the use of unitary business principles for express companies and accepted the principle that the measure of tax could be based upon a comparison of activities within a single state to those carried on everywhere by the business. In the cases presented to the Court there were no physical ties between the various locations of the express companies. All transportation, other than local delivery, was accomplished through the use of third parties such as railroads and steamship lines. As the Court stated, "The physical unity existing in the former [railroads, etc.] is lacking in the latter [express companies]; but there is the same unity in the use of the entire property for the specific purpose." (p. 221.)

The Court in passing noted that a party owning "a manufacturing establishment in one state and a store in another . . . is separate." (p. 222.) Barely twenty years later, the Court effectively rejected this bit of dictum in *Underwood Typewriter Company v. Chamberlain*, 254 U. S. 113 (1920), in holding that the unit rule applied to a business which manufactured goods in one state and sold them in several. The conclusion that a single business was being conducted was so obvious that it was not even discussed.

In *Butler Brothers*, supra, the Court considered the propriety of a California tax assessed against a single corporation engaged in the wholesaling of dry goods and general merchandise through distribution houses located in seven states. Although the Court stated that while:

> Each of its houses in the seven states maintains stocks of goods, serves a separate territory, has its own sales force, handles its own sales and all solicitation, credit and collection arrangements in connection therewith, and keeps its own books of account. (p. 504.)

there never was a question that a single business was involved. The taxpayer argued that each distribution house could be separately accounted for, and this argument was rejected on the grounds that "California may properly treat appellant's business as a unitary one. Cf. *Grant Atlantic & P. Tea Co. v. Grosjean.*, 301 US 412, 81 L Ed 1193, 57 S Ct 772." (p. 508.)

As recently as the 1979-1980 term, this Court had the opportunity to consider whether the marketing, refining and exploration departments of an oil company constituted a single business in the case of *Exxon Corporation*

v. Wisconsin Department of Revenue, 447 U. S. 207 (1980). The Court concluded they did even though the only activity engaged in in Wisconsin was marketing. Exxon, in arguing before the Supreme Court, conceded that its marketing operations constituted a single unitary business and argued only that the separate functions engaged in by the company represented distinct business activities. (Footnote 7, p. 223.) The Court accepted, without comment, Exxon's concession that its horizontal activities were unitary.

In *Mobil Oil Corporation v. Commissioner,* 445 U. S. 425 (1980), the Court indicated a predelection to holding a vertically integrated business unitary when it stated that Mobil "has made no effort to demonstrate . . . its subsidiaries and affiliates are distinct. . . . Indeed, all indications in the record are to the contrary, since . . . [they] are part of appellant's integrated petroleum enterprise." (p. 439.)

THE VIEWS OF FRANK KEESLING

This Court has frequently cited with approval the writing of Frank Keesling, who has authored and coauthored many articles on allocation and apportionment of income. (E. g., footnote 14, *Mobil Oil,* supra; footnotes 22 and 25, *F. W. Woolworth Co. v. Taxation and Revenue Department of New Mexico,* — U. S. —, 50 Law Week 4957 (1982); and footnote 22, *ASARCO Inc. v. Idaho State Tax Commission,* — U. S. —, 50 Law Week 4962 (1982).) This is of course proper. Mr. Keesling has frequently been referred to as the "father of the unitary concept." He clearly was one of the originators of the combined

report procedure. (See 42 Journal of Taxation 106, Feb. 1975.)

Keesling's views have evolved as has the utilization of the unitary concept. In "California's Uniform Division of Income for Tax Purposes Act," 15 U. C. L. A. L. Rev. 156, 169 (1967), he commented on the efforts of *Superior Oil*, supra, and *Honolulu Oil*, supra, thusly:

> In deciding to what extent its policies should be altered in the light of the Superior Oil and Honolulu Oil decisions, the Franchise Tax Board seized upon this "type of business" test. If a taxpayer is engaged in one type of business within and without the state, the formula method would be used. If it is engaged in one business here and a different type of business elsewhere, separate accounting would still be appropriate. If it is engaged in two or more types of businesses, each of which is conducted within and without the state, then the net income of each business would be determined separately, but the allocation would in each case be made by the formula method.

Footnote 40 which is referred to states:

> Shortly after the decisions of the California Supreme Court in Superior Oil and Honolulu Oil became final, Martin Huff, Executive Secretary of the Franchise Tax Board, arranged a conference attended by members of the staff of the Franchise Tax Board, representatives of the Attorney General's Office, representatives of the State Board of Equalization and representatives of the public who were intimately concerned with the Board's allocation policies. One of the authors of this article attended the conference and recommended the policy described in the text. It was recognized that in the case of most businesses doing business within and without the state there are elements of unity similar to those involved in the

Superior Oil and Honolulu Oil cases and relied upon by the court in upholding the formula method. It was further recognized that the above is true whether the businesses within and without the state are the same kind or a different kind. Nevertheless, because of the seriousness of the problem it was believed that if the formula method was to be extended to companies operating different kinds of businesses the extension should be made by the courts and the administrator should not assume responsibility for such a decision in the first instance.

More recently in "A Current Look at the Combined Report and Uniformity in Allocation Practices," 42 Journal of Taxation 106, 109 (1975), Mr. Keesling stated:

> The author early defined a unitary business as one in which there is a relationship of "dependency and contribution between the portions of the business within and without the taxing state." This was borrowed by the California Supreme Court in the Edison Stores case, and was later adopted by the California Franchise Tax Board, the successor to the California Franchise Tax Commissioner.
>
> At this point, it is questionable whether there is such a thing as a non-unitary business. Although it is appropriate to compute non-business income separately and to allocate it specifically, the view that all income from commonly-owned business activities should be combined and apportioned by a single formula without inquiring as to whether such activities are unitary or separate in nature seems preferable. Such a policy is simple to administer and will promote uniformity.
>
> Wherever there is common ownership there is a certain amount of common management, centralized performance of certain functions, and other indications of integration.

A policy which requires that the income from certain business activities should be computed and allocated separately on the grounds that such activities are not sufficiently integrated with other business activities to constitute a single unitary business will necessitate the drawing of numerous fine lines of distinction with respect to which reasonable people may well differ. Hence, any such policy will give rise to difficult administrative problems and will promote disparity rather than uniformity in allocation practices.

Moreover, such a policy works against the states and in favor of taxpayers. If a taxpayer wants the formula method to be applied across the board, it will call attention to various elements of integration and unity. If, however, it wants certain activities to be dealt with separately, such elements will be concealed and in many cases may not be discovered by state representatives.

Mr. Keesling went on to suggest that it might even be proper to treat all income as business income. See 1981 B. Y. U. L. Rev. 87, speculating on the results of *Mobil*, supra.

THE VIEWS OF CONTAINER CORPORATION OF AMERICA

CCA conducts its United States activities through a single corporation. No question has been raised regarding the fact that CCA is involved in a unitary business within the United States. CCA filed on this basis with California. It has never questioned this fact in subsequent proceedings.

THE FACT THAT A UNITARY BUSINESS IS CARRIED ON BY SEVERAL CORPORATIONS RATHER THAN A SINGLE ENTITY SHOULD NOT AFFECT THE RESULT

Simply stated, the purpose of the combined report is to insure that the income of a business conducted partly within and partly without the taxing state shall be determined and apportioned in the same manner regardless of whether the business is conducted by one corporation or by two or more affiliated corporations. In cases where the business is conducted by one corporation, the income is computed as a unit and apportioned by means of an appropriate formula.

• • •

When the combined report is employed, exactly the same procedure is followed, and the same results obtained, in cases where the business is conducted by more than one corporation. The income is still computed as a unit just as it would be if the business had been conducted by one corporation only. (Keesling, Journal of Taxation, supra, p. 106.)

Keesling continues (p. 108) by describing the birth of combined reporting:

For many years following the inception of the California Franchise Tax in 1929, the members of a well-known, and, in those days, highly profitable, industry were paying only the minimum franchise tax. The technique was quite simple. The property produced in California was sold to wholly-owned out-of-state distributing corporations at cost. Thus, the production corporations in California filed returns showing no income from California sources. All of the income was reported by the distributing corporations, and for the most part escaped state income tax completely.

• • •

The thought occurred that if, in the case of a single corporation doing business within and without the taxing state, it is permissible for the state to look beyond its borders and take into account the entire income of the business in order to determine the true income realized from the portion of the business conducted within the state, then why should it not be equally permissible for a state, in the case of a multi-corporate business to look beyond the corporate lines and take into account the entire income from the business in order to determine the true income attributable to the corporation or corporations doing business within the state?

If in the case of a single corporation, the state is not compelled to make an apportionment on the basis of the taxpayer's books of account, but can disregard them and make the apportionment by applying a formula to the income from the entire business, then why shouldn't it likewise be permissible in the case of a multi-corporate business to disregard the taxpayer's books of account and apportion the income by applying a formula to the entire income of the business?

This line of reasoning appeared convincing, and so the combined return or combined report procedure was born. Its purpose was two-fold. First, to prevent tax avoidance through the manipulation of transactions, such as sales, between controlled corporations, and second, to insure that the income of a multi-corporate business should be computed and apportioned in the same manner as in the case of a single corporate business, thus promoting equality and uniformity in the application of the state's tax laws. It has accomplished both of these objectives very effectively.

The California Supreme Court in *Edison California Stores, Inc. v. McColgan,* 30 Cal. 2d 472, 183 Pac. 2d 16 (1947), sanctioned the combined report principle.

The *Edison* case involved a business based in St. Louis, Missouri, which had formed fifteen separate subsidiaries to operate shoe stores in fifteen different states. The California court found, "The business of the parent and all of its subsidiaries is owned and managed under one centralized system . . . [t]hus the business is unitary." (p. 480.) It further stated, "that the separate accounting method is appropriate to determine the true income of a separate business; but that when the business is not separate . . . separate accounting is inadequate and unsatisfactory." (pp. 480-481.) Clearly crucial to the Court's finding was the fact that the same type of business was operated in each state.

It is our understanding that Container Corporation of America (CCA) is involved in the manufacture of containerized packaging from the processing of raw materials such as wood pulp, waste paper, etc., into paperboard, the design of containers, including visual presentations, and the manufacture of paperboard into the final product. These processes are carried on throughout the United States by CCA. They are also carried on throughout significant portions of Latin America and Europe through subsidiaries. The same general activities are carried on in all jurisdictions. It logically and reasonably can be said that a single business exists encompassing all aspects of the manufacture and marketing of containers.

The Court should ask itself whether or not there is any material difference between how the United States business is operated and CCA's relationship with its for-

eign subsidiaries. If the relationship is the same, with perhaps some allowance for the distances involved, then the result should be the same.

Two differences are readily apparent. First, the activities are carried on in foreign countries; second, the activities are carried on by subsidiaries rather than by CCA. Should this make a difference? Clearly, it should not. And the Court has already so indicated.

With respect to the foreign character of the activities, the Court, in *Mobil Oil,* supra, said:

> Bass, Ratcliff & Gretton forecloses the contention that the foreign source of the . . . income alone suffices for this purpose. (p. 439.)

The Court went on to indicate that no effort was made to show the foreign activities were discrete in any business or economic sense. The effort has been made by CCA, but it clearly has failed, as shown by the second alleged distinction.

The Court should also ask itself, as it apparently did in *Mobil,* at 440-441, whether intercorporate division is relevant. The answer:

> Had appellant chosen to operate its foreign subsidiaries as separate divisions of a legally as well as a functionally integrated enterprise, there is little doubt that the income derived from those divisions would meet due process requirements for apportionability.
> (pp. 440-441.)

If the Court will but ask itself the same question with respect to CCA, the conclusion will be obvious.

The history of the development of the unitary method as set forth above shows that it is an evolutionary concept just as the decisions of this Court in the field of state taxation have been evolutionary. The unitary method originated with the effort by a single state to fairly apportion the property values of a single business, interconnected by tangible physical ties, amongst its subdivisions. The methodology was extended to cover property located in several states. It evolved to the point where no actual physical connection between the locations of the business was required. Then it was extended to income taxes in a case where the Court had previously suggested there was no connection. *Adams Express,* supra, compared to *Underwood Typewriter,* supra.

In the income tax field, the method was first applied to a vertically integrated business where manufacturing occurred in one state and sales in several states. Then it was extended to a horizontally integrated business where the same activities were conducted in several states under the overall control of a single management. It has evolved from situations involving direct physical ties between businesses to those involving intangible, but nonetheless real, ties. CCA represents a step along this progression. It should be viewed as representative of the current practice and not as a new extension. It involves nothing more than an enterprise engaged in the same type of business in a number of jurisdictions. These are not separate businesses but "branches" of the same business.

———o———

SUMMARY

Application of the principles set forth in the Multistate Tax Commission Regulations and as reflected in the decisions of this Court, the California courts, and one of the leading commentators in the field of state taxation, require this Court to sustain the determination of the California courts that CCA and its foreign subsidiaries are involved in a unitary business.

THE COURT'S RECENT DECISIONS IN ASARCO AND WOOLWORTH SHOULD NOT BE FOLLOWED IN THIS CASE

On June 29, 1982, this Court handed down decisions in *F. W. Woolworth Co. v. Taxation and Revenue Department of New Mexico*, — U.S. —, 50 Law Week 4957, and *ASARCO Inc. v. Idaho State Tax Commission*, — U.S. —, 50 Law Week 4962. In both decisions the Court held that dividends received by the taxpayers from subsidiaries and affiliates, all involved in the same general line of business as the dividend recipient, were not business income. We believe these cases were incorrectly decided. In any event, they are clearly distinguishable from the facts involved in this case and should not be followed in this case.

As set forth in the preceding sections of this brief, the majority opinions in both *ASARCO* and *Woolworth* appear to ignore presumptions arising from the fact that the entities involved in those cases were involved in a common business. Those presumptions provide a valid basis for finding that the unitary business principle is applicable. As Justice O'Connor said in her dissent in *ASARCO*, "Both common sense and business realities dic-

tate a different result." (Slip Opinion, p. 5.) This Court should grant rehearings in these cases and reverse its decisions.

Whether or not the Court chooses to reverse its unfortunate decisions in *ASARCO* and *Woolworth*, it is clear that there are two bases for distinguishing CCA. These distinctions dictate a different result in CCA.

First, the factual record developed in CCA establishes that a unitary relationship exists. A review of the findings of the California Court does not begin and end with the presumption arising from a similar business. There is no question of controlling ownership in CCA which was clearly a determinative factor in the Idaho Supreme Court's decision in *ASARCO,* and which the majority of this Court seemed to find relevant in its decision. The California Court's decision sets forth a number of relationships existing in CCA whose absence in *Woolworth* apparently controlled the outcome.

Second, CCA involves the use of the combination approach. Under this approach California has included all of the income, and more importantly all of the formula factors, in computing the amount of income properly attributable to California. CCA does not suffer from the potential defect raised by Justice Stevens in his dissent in *Mobil,* supra, at p. 460. The apportionment formula takes into account the income-producing activities which gave rise to the income. The formula assigns income

to California and it also would assign income to the foreign subsidiaries. This potential defect was not commented upon by the majority in *ASARCO* or *Woolworth*, but it must have entered into the decision-making process of at least one judge. The Court should take cognizance of the fact that it is not present in this case.

In the majority opinion in *ASARCO* the Court said the position advanced by the state would "destroy the concept"; in *Woolworth*, it "would trivialize the due process limitation." Justice O'Connor, in her dissent in *ASARCO*, says the majority "shrinks the concept beyond all recognition." It is clear that the Court is unanimous in its acceptance of the unitary business principle and that all members recognize the importance of maintaining its vitality. CCA involves an application of the unitary concept which provides the middle ground on which all members of the Court can agree. If the unitary concept is to remain vital, the Court must sustain the tax assessed by California.

CONCLUSION

This Court has the opportunity in CCA to reaffirm its support for the unitary business principle and clarify any misapprehensions which may have been created by its decisions in *ASARCO* and *Woolworth*. It should take

advantage of this opportunity and affirm California's action.

Respectfully submitted,

ROBERT O. WEFALD
Attorney General of State of North Dakota
State Capitol
Bismarck, North Dakota 58505
(701) 224-2210

KENNETH M. JAKES
Counsel of Record
Assistant Attorney General
State of North Dakota
State Capitol-Eighth Floor
Bismarck, North Dakota 58505
(701) 224-2770

Attorneys for Amicus Curiae State of North Dakota

September, 1982